No. 83923-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

SALVADOR RIVERA, Petitioner.

RESPONSE TO MOTION FOR DISCRETIONARY REVIEW OF PERSONAL RESTRAINT PETITION

DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By HILARY A. THOMAS
Appellate Deputy Prosecutor
Attorney for Respondent
WSBA #22007

Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 676-6784

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Washington State Court of Appeals

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A. IDENTITY OF RESPONDENT

Respondent, State of Washington, by Hilary A. Thomas, Appellate Deputy Prosecutor for Whatcom County, and in accord with the Court's request for a response, responds to Petitioner Rivera's motion for discretionary review.

B. DECISION BELOW

The Court of Appeals issued a ruling denying Petitioner Rivera's personal restraint petition.

C. ISSUES PRESENTED FOR REVIEW

Whether a personal restraint petition presents an issue of substantial public interest thereby warranting review when the petition is time-barred from consideration and when the case it relies upon for overturning the sentence enhancement, Recuenco III,[1] does not apply retroactively to his case, a case which was final long before Recuenco III and the case it is premised upon, Blakely,[2] were decided.

D. STATEMENT OF THE CASE

Appellant Rivera was charged with Murder in the First Degree, while armed with a firearm deadly weapon, pursuant to RCW 9.94A.125 and RCW 9.94A.310(3)(a), for acts that occurred on March 20, 1998.

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[1] State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008).
[2] Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

Petitioner's Court of Appeals ("COA") Supp. Brief, Ex. B. He was found guilty and sentenced to 333 months on the offense and 60 months on the firearm deadly weapon enhancement. App. A, Judgment and Sentence.[3] Rivera appealed his conviction, which appeal was denied, and the mandate issued on May 17, 2002. *See*, State v. Rivera, 108 Wn. App. 645, 32 P.3d 292 (2001), *rev. den.*, 146 Wn.2d 1006 (2002).

On June 4, 2008 Rivera filed the current petition as a CrR 7.8 motion with Whatcom County Superior Court. State's COA Response Brief, App. B (Initial Consideration Order). The Superior Court transferred Rivera's motion to the Court of Appeals to be considered as a personal restraint petition on June 5, 2008. Id.

E. ARGUMENT

Rivera asserts that the Court of Appeals erred in finding that his judgment and sentence is not invalid on its face and asserts under Recuenco III he is entitled to have his firearm deadly weapon enhancement reduced to a non-firearm deadly weapon enhancement. The judgment and sentence is not invalid on its face because it cites the specific statutory basis for a firearm enhancement, "RCW 9.94A.310(3)(a)a" (*sic*). Even if the Court were to go beyond the four

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[3] The Judgment and Sentence attached as App. A was appended to petitioner's Supplemental Brief as Exhibit B.

corners of the judgment and sentence, the judgment and sentence is facially valid. The information specifically alleged the statutory section referencing the firearm enhancement, in addition to alleging that Rivera committed the murder with a .22 caliber handgun. While the special verdict form asked whether the defendant was armed with a "deadly weapon," the statutory term deadly weapon includes firearms, and "deadly weapon" for purposes of the special verdict form was defined *only* as a firearm. Rivera has failed to meet his burden to show that the judgment and sentence *is* invalid on its face and thus the Court of Appeals did not err in finding his petition untimely.

Rivera's reliance on Recuenco III is misplaced in this untimely collateral attack context. The portion of Recuenco III related to the lack of a jury finding to support the firearm enhancement is predicated upon Blakely. To the extent that Rivera asserts that the firearm enhancement is not supported by sufficient jury findings, he cannot raise that issue at this time because his conviction was final before Blakely was decided and Blakely is not retroactive. His motion for discretionary review should be denied.

1. Rivera has failed to demonstrate that the judgment and sentence is invalid on its face.

Rivera asserts that his petition is not valid on its face because it is not authorized by law. Rivera asserts that the judgment and sentence only references a deadly weapon finding and that the deadly weapon statute only permits a 24 month enhancement and not a 60 month enhancement, and therefore the trial court erred in imposing a 60 month enhancement. The judgment and sentence, however, does specify that a firearm enhancement was found and was being imposed. Moreover, at the time the firearm deadly weapon enhancement was imposed, the enhancement was not only authorized by law, given the "deadly weapon" special verdict, but was required to be imposed. Most of the cases that Rivera cites to for the proposition that the opinion in this case is in conflict with other cases are cases that were decided and/or were on direct review after Blakely, including State v. Williams-Walker.[4] Therefore, a different standard applies to those sentences. The only case that he cites to that is in a similar procedural position to this case is In re Scott. That case is distinguishable because the court there found that the trial court did not make a written finding that the deadly weapon was a firearm. The Court

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[4] State v. Williams-Walker, 167 Wn.2d 889, 225 P.3d (2010).

of Appeals here did not err in finding that the trial court did not exceed its statutory authority and in denying Rivera's untimely petition.

If the judgment and sentence reflects that the sentence imposed was within the trial court's legal authority, the judgment and sentence is valid on its face. In re Personal Restraint of Hemenway, 147 Wn.2d 529, 532, 55 P.3d 615 (2002). In order to determine whether the trial court exceeded its statutory authority in imposing sentence, the court looks to the relevant portions of the Sentencing Reform Act *at the time the defendant was convicted.* In re West, 154 Wn.2d 204, 211-12, 110 P.3d 1122 (2005) (emphasis added). Under the statutes at the time, if the jury returned a deadly weapon special verdict finding, the trial court had authority to impose a five year enhancement where the deadly weapon was a firearm and a two year enhancement if a deadly weapon other than a firearm was used. RCW 9.94A.310(3)(a); RCW 9.94A.310(4)(a) (1998); In re Personal Restraint of Scott, 149 Wn. App. 213, 202 P.2d 985, 989 (2009) (at the time of sentence "case law allowed a trial court to impose a firearm enhancement on a jury's deadly weapon special verdict").[5] At the

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[5] *See also*, State v. Rai, 97 Wn. App. 307, 983 P.2d 712 (1999), *abrogated by* State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005); State v. Olney, 97 Wn. App. 913, 987 P.2d 662 (1999), *abrogated by* State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005); State v. Serrano, 95 Wn. App. 700, 706-07, 977 P.2d 47 (1999); State v. Meggyesy, 90 Wn. App. 693, 706-08, 958 P.2d 319 (1998), *rev. den.*, 136 Wn.2d 1028 (1998), *abrogated by* State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005).

time, it was mandatory for a court to impose a firearm enhancement where the uncontested facts were that the deadly weapon was a firearm. State v. Rai, 97 Wn. App. 307, 312, 983 P.2d 712 (1999), *abrogated by* State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005).

Rivera asserts that the judgment and sentence's references to "deadly weapon," as opposed to "firearm," render the judgment and sentence invalid on its face. However, this ignores the fact that the scheme in effect at the time was that one statute, RCW 9.94A.125, authorized the imposition of a "deadly weapon finding" and set forth the procedure for it, while another statute RCW 9.94A.310, set forth the specific enhancement times depending upon whether or not the deadly weapon was a firearm or not.

> In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice *was armed with a deadly weapon* at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice *was armed with a deadly weapon* at the time of the commission of the crime.

RCW 9.94A.125 (1998). RCW 9.94A.310 (3) and (4) set forth the enhancement periods depending upon whether the deadly weapon was a firearm or not and depending upon the classification of the crime

committed. *See*, State v. Brown, 139 Wn.2d 20, 26, 983 P.2d 608 (1999) ("When a jury makes a special finding that a felony offender was armed with a deadly weapon, certain "'additional times shall be added to the presumptive sentence[.]'") A firearm is a type of deadly weapon under RCW 9.94A.125 and at the time a "deadly weapon" finding or the use of the term "deadly weapon" did not mean that the deadly weapon used was a *non*-firearm deadly weapon. *See*, State v. Williams-Walker, 167 Wn.2d 889, 921 n.5, 225 P.3d 913 (2010) (hard time for armed crime act split the deadly weapon enhancement into a "firearm" enhancement and a "deadly weapon other than a firearm" enhancement; "deadly weapon" continues to include a firearm).

The judgment and sentence shows that the judge explicitly found that the applicable deadly weapon enhancement was the firearm enhancement, specifically the five year enhancement. The judgment and sentence here states:

> II. FINDINGS
>
> Based on the testimony heard, statements by the defendant and/or victims, argument of counsel, the presentence report and case record to date, **the Court finds:**
>
> CURRENT OFFENSE(S): The defendant was found GUILTY on October 13, 1998, by JURY VERDICT of: MURDER IN THE FIRST DEGREE (while armed with a deadly weapon):
>
> Count No. I

Crime: MURDER IN THE FIRST DEGREE
RCW: 9A.32.030(1)(a), 9.94A.125, and **9.94A.310(3)(a)**a (sic)
Crime Code: Class "A" Felony
Date of Crime: 3/20/08
Incident No. 98A-5437

(XX) with a special verdict/finding for use of deadly weapon on Count(s): I.

App. A at 1-2 (emphasis added). Furthermore, there is no reference in the judgment and sentence to RCW 9.94A.310(4)(a) as there would be if the court was finding and imposing the "deadly weapon other than firearm" enhancement. The judgment and sentence specifically references the statutory basis for the firearm deadly weapon enhancement. As the Court of Appeals found, the judgment and sentence cited the correct statutory authority for imposition of the five year, firearm, enhancement, RCW 9.94A.310(3)(a). Opinion at 4. There is no error on the face of the judgment.

The judgment's specific finding that the deadly weapon fell under RCW 9.94A.310(3)(a) distinguishes this case from In re Personal Restraint of Scott, 149 Wn. App. 213, 202 P.3d 985 (2009).[6] The court there found that the judgment and sentence misstated the jury's special

[6] Rivera asserts that In re Delgado, 149 Wn.App. 223, 204 P.3d 936 (2009) is similarly situated to In re Scott. It is not. Delgado was a timely collateral attack and the facial validity of the judgment and sentence was not an issue in that case.

verdict and that the jury had only found that the defendant was armed with a non-firearm deadly weapon and not a firearm deadly weapon. Id. at 220. The court noted that while the sentencing court had the authority under the law at the time to impose a firearm enhancement upon a jury returning a "deadly weapon" special verdict, the court had failed to make and to memorialize any such finding. Id. at 221-22. Therefore, it found the judgment and sentence invalid on its face, and the petition not time-barred. Id.

Rivera asserts that the Court should consider the special verdict form in this case in deciding whether the judgment and sentence is invalid on its face. A judgment and sentence is constitutionally invalid on its face only if the judgment "*without further elaboration* evidences infirmities of a constitutional magnitude." In re Thompson, 141 Wn.2d 712, 718, 10 P.3d 380 (2000) (emphasis added); *see also*, In re Personal Restraint of Clark, __ Wn.2d __, 2010 Westlaw 1380165 at ¶15 (April 8, 2010) (evidence of constitutional infirmity must appear on the face of the judgment and sentence). The error of law or fact must appear within the four corners of the judgment and sentence itself. State v. Ross, 152 Wn.2d 220, 231, 95 P.3d 1225 (2004). Only in limited cases are documents other than the judgment and sentence considered in order to determine if the judgment and sentence is valid on its face, and usually only in cases where

there was a plea. In re Personal Restraint of Rowland, 149 Wn. App. 496, 504-05, 204 P.3d 953 (2009); *but see*, In re Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004) (informations, plea statements and jury instructions were considered to determine if the conviction was for a nonexistent crime, thus rendering the judgment and sentence invalid on its face). To the extent that a court references other documents, it may do so only if those documents are relevant to determining whether *the judgment and sentence itself is facially invalid.* In re McKiearnan, 165 Wn.2d 777, 782, 203 P.3d 375 (2009); *see also*, In re Personal Restraint of Clark, 2010 Westlaw 1380165 at ¶14 (flaws in plea agreement did not render judgment and sentence invalid).

Relying on Recuenco III Rivera furthers asserts that a "reference to a handgun" during trial does not provide the court with authority to impose a firearm enhancement, a more onerous punishment than what was sought and found by the jury. But the information clearly charged that the deadly weapon was a firearm and specifically referenced the five year firearm sentence enhancement, RCW 9.94.310(3)(a).[7] The State was

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[7] Murder in the First Degree, Count I: That the defendants, SALVADOR HERNANDEZ RIVERA AND JOSE MANUEL RIVERA-HERNANDEZ and each of them, then and there being in said county and state, on or about the 20th day of March, 1998, with premeditated intent to cause the death of another person, did **shoot** Matthew Garza, thereby causing the death of Mr. Garza, a human being, in violation of RCW 9A.32.030(1)(a), which violation is a Class "A" Felony, and during the course or commission of said crime, the defendants or one of them was

seeking, and provided sufficient notice to Rivera that it was seeking, a firearm enhancement.

If this court were to go beyond the four corners of the judgment and sentence to determine facial validity, the jury's general verdict along with the special verdict show that the jury found Rivera was armed with a firearm when he committed first degree murder. The to-convict instruction on Murder in the First Degree required that the jury find beyond a reasonable doubt that Rivera shot the victim. State's COA Response Brief, App. D, Instr. No. 14. Moreover, the special verdict instruction *only* defined the deadly weapon as a firearm. App. B. The jury's general and special verdict, in accord with RCW 9.94A.125 and RCW 9.94A.310(3)(a), clearly provided the basis for the court's imposition of the 60 month firearm enhancement. Those additional documents do not reflect that the court imposed a sentence based on findings not made by the jury.

Rivera provides the additional authority of State v. Williams-Walker for the proposition that the judge is bound by the jury's special

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> **armed with a deadly weapon, to-wit: a .22 caliber handgun**, for the purposes of the deadly weapon enhancement of RCW 9.94A.125 and **9.94A.310(3)(a)**.

Petitioner's COA Supp. Brief, App. B (emphasis added).

verdict *form*, which he asserts was merely the "deadly weapon" finding. Again this ignores the fact that a "deadly weapon" finding at the time could mean either a firearm or a non-firearm deadly weapon finding. A "deadly weapon" finding at the time the sentence was imposed did not mean a "deadly weapon other than a firearm" finding. *See*, State v. Williams-Walker, 167 Wn.2d 889, 921 n.5, 225 P.3d 913 (2010). Williams-Walker held that the underlying guilty verdicts alone are not sufficient to authorize sentence enhancements. 167 Wn.2d at ¶17, 19. Williams-Walker did not address what documents can be considered in determining the facial validity of a judgment and sentence in a collateral attack. It also does not hold that a reviewing court cannot consider the special verdict jury instruction defining deadly weapon only as a firearm in determining whether the special verdict form "deadly weapon" finding supports a court's imposition of a firearm deadly weapon enhancement.

Moreover, Williams-Walker is a case that was decided on direct review and not collateral attack. At the time the sentence was imposed in this case, the law very clearly did not bind a sentencing court to the jury's "special verdict form," and in fact a trial court was required to impose a firearm enhancement where the deadly weapon used was a firearm. (*See* cases cited in footnote 5 on p. 5 herein.)

Other documents may only be considered to the extent that they reveal an error on the face of the judgment and sentence. While the special verdict form here used the term "deadly weapon," and not the more specific terms of either "firearm" or "deadly weapon other than firearm," the special verdict instruction *only* defined a deadly weapon as a firearm. App. B., Jury Instruction No. 37. Therefore, in determining the facial validity of the judgment and sentence, the special verdict jury instruction shows that in answering yes on the special verdict form the jury found that the deadly weapon used was a firearm.

Rivera failed to meet his burden to demonstrate that the judgment and sentence is invalid on its face. It is not enough to allege that the judgment and sentence is ambiguous, he must demonstrate that it is in fact facially invalid. He has not and his petition is time-barred.

2. To the extent that Rivera asserts that the firearm enhancement was not supported by the jury's verdict, Recuenco III does not provide a basis for vacating Rivera's firearm enhancement because Blakely is not retroactive to cases like Rivera's that were final when it was decided.

Rivera relies upon Recuenco III in asserting that the firearm enhancement is not supported by the jury's "deadly weapon" finding. However, Recuenco III cannot be applied retroactively to Rivera's case because it was final before Blakely. The court in Recuenco found that the

error "occurred when the trial judge imposed a sentence enhancement for something the State did not ask for and the jury did not find. Recuenco III, 163 Wn.2d at 442. After finding that the prosecution charged and sought only the lesser "deadly weapon" enhancement, the court specifically found that the "sentencing judge then committed error by imposing a sentence outside the judge's authority, a sentence that was not authorized by the jury." Id. at 435-36, 439. The court also concluded that harmless error did not apply to the circumstances of that case because: "it can never be harmless to sentence someone for a crime not charged, not sought at trial, and not found by a jury." Id. at 442.

The issue that the jury's verdict did not support the firearm enhancement but only a deadly weapon enhancement in Recuenco III was premised upon Blakely. Prior to Blakely the sentencing court was authorized, and even legally required, to make the finding as to whether a firearm or non-firearm deadly weapon enhancement applied to the facts of the case. *See, infra*, at 5-6. As the sentence here was valid at the time it was entered, there was no basis for asserting that the enhancement was invalid until Blakely was decided. Blakely does not apply retroactively to cases that were final when it was issued and does not fall within the state law exception for retroactive application under RCW 10.73.100(6). State v. Evans, 154 Wn.2d 438, 114 P.3d 627, *cert. den.*, 546 U.S. 983 (2005).

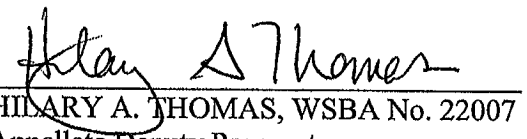
Recuenco III's reliance on the sentence not being authorized by the jury verdict is predicated upon Blakely and provides no basis for relief here because Rivera's case was final before Blakely was decided. *See*, In re Scott, 149 Wn. App. at 221 n.4 (while judicial fact-finding regarding type of deadly weapon used is now prohibited by Blakely, Blakely does not apply retroactively and could not provide petitioner any relief because his case was final before Blakely).

F. CONCLUSION

Rivera failed to demonstrate that the judgment and sentence is facially invalid. Even considering documents outside the four corners of the judgment and sentence, the firearm enhancement was within the court's sentencing authority at the time it was imposed. His motion for discretionary review should be denied.

DATED this 9th day of April, 2010.

Respectfully submitted,



HILARY A. THOMAS, WSBA No. 22007
Appellate Deputy Prosecutor
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or otherwise caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Petitioner's counsel, addressed as follows:

Nancy P Collins
Washington Appellate Project
1511 3rd Ave Ste 701
Seattle WA 98101-3635

Sydney A. Koss
LEGAL ASSISTANT

4/9/2010
DATE

APPENDIX A

ORIGINAL

FILED IN OPEN COURT
12-15 1998
WHATCOM COUNTY CLERK
By Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

THE STATE OF WASHINGTON, Plaintiff, vs. SALVADOR HERNANDEZ RIVERA Defendant.	)	No. 98-1-00289-4 JUDGMENT AND SENTENCE (FELONY)

I. HEARING

1.1 A sentencing hearing in this case was held: December 15, 1998.

1.2 Present were:

Defendant: SALVADOR HERNANDEZ RIVERA
Defendant's Lawyer: JON C. KOMOROWSKI
Prosecuting Attorney: DAVID S. McEACHRAN
Judge: MICHAEL F. MOYNIHAN

1.3 The State has moved for dismissal of Count(s) N/A.

1.4 Defendant was asked if there was any legal cause why judgment should not be pronounced, and none was shown.

II. FINDINGS

Based on the testimony heard, statements by defendant and/or victims, argument of counsel, the presentence report and case record to date, the Court finds:

2.1 CURRENT OFFENSE(S): The defendant was found GUILTY on ~~December 15,~~ October 13 1998, by JURY VERDICT of: MURDER IN THE FIRST DEGREE (while armed with a deadly weapon):

Count No. I
Crime: MURDER IN THE FIRST DEGREE
RCW: 9A.32.030(1)(a), 9.94A.125, and 9.94A.310(3)(a)a
Crime Code: Class "A" Felony
Date of Crime: 3/20/98
Incident No. 98A-5437

(XX) With a special verdict/finding for use of deadly weapon on Count(s): I.

( ) Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.400(1)):

( ) Additional current offenses are attached in Appendix A.

2.2 CRIMINAL HISTORY: Criminal history used in calculating the offender score is (RCW 9.94A.360):

Crime: POSSESSION OF MARIJUANA (for sale)
Sentencing Date: 1/13/95
Adult or Juvenile Crime: Adult

2.3 SENTENCING DATA:

	Offender Score	Seriousness Level	Range	Maximum Term
COUNT NO. I:	1	XIV	250-333 mos.	LIFE
(deadly weapon clause)			60 mos.	
TOTAL:			310-393 mos.	

( ) Additional current offenses sentencing information is attached in Appendix C.

2.4 EXCEPTIONAL SENTENCE:

( ) Substantial and compelling reasons exist which justify a sentence (above) (below) the standard range for Count(s) _____. Finding of Fact and Conclusions of Law are attached in Appendix D.

2.5 CATEGORY OF OFFENDER: The defendant is:

(a) (XX) An offender who shall be sentenced to confinement over one year.

(b) ( ) An offender who shall be sentenced to confinement one year or less.

(c) ( ) A first time offender who shall be sentenced under the waiver of the presumptive sentence range (RCW 9.94A.030(12),.120(5)).

(d) ( ) A sexual offender who is eligible for the special sentencing alternative and who shall be sentenced under the alternative because both the defendant and community will benefit from its use (RCW 9.94A.120(7)(a)).

(e) ( ) A felony sexual offender who shall be sentenced to confinement of over one year but less than six years and shall be ordered committed for evaluation of defendant's amenability to treatment (RCW 9.94A.120(7)(b)).

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the crime(s) of: MURDER IN THE FIRST DEGREE (while armed with a deadly weapon).

IV. ORDER

IT IS ORDERED that defendant serve the determinate sentence and abide by the conditions set forth below.

4.1 Defendant shall pay to the Clerk of this Court:

(a) $110.00 court costs;

(b) $500.00 victim fund assessment;

(c) $ TBD (for burial expenses) - restitution
_____ Joint & several with co-defendant;
_____ On all counts charged;
_____ Other:

( ) Schedule of Restitution is attached as Appendix E.

(d) $ 1,425.00 recoupment for court-appointed attorney's fees;

(e) $_____ fine;

(f) $_____ drug enforcement fund;

(g) OTHER COSTS FOR:

(XX) $100.00 = CRIME LABORATORY ANALYSIS

(h) $ 2,135.00 + RESTITUTION = TOTAL MONETARY OBLIGATIONS

(i) Payments shall be made in the following manner:

(XX) That the defendant shall set up a payment schedule with his/her community corrections officer. That the defendant shall report IMMEDIATELY to his/her Community Corrections Officer to set up a schedule for the payment of his/her court-ordered legal financial obligations and the Community Corrections Officer shall monitor these payments.

( ) That defendant shall pay the amount of $_____ per month toward his/her legal financial obligations. That the defendant shall report IMMEDIATELY to his/her Community Corrections Officer to set up a schedule for the payment of his/her court-ordered legal financial obligations and the Community Corrections Officer shall monitor these payments.

(j) This Court shall retain jurisdiction over the defendant for a period of TEN (10) years to assure payment of the above monetary obligations.

4.2 The Court DISMISSES Count(s) N/A.

4.3 CONFINEMENT OVER ONE YEAR: Defendant is sentenced to a term of total confinement in the custody of the DEPARTMENT OF CORRECTIONS as follows commencing IMMEDIATELY:

333 + 60 months for Deadly Weapon = 393 MONTHS for Count No. I.

(XX) Credit is given for TIME SERVED OF _____ DAYS as of MARCH 21, 1998, and credit for any additional time served beyond that date until defendant is transported to the Department of Corrections.

( ) The terms in COUNTS No. are CONCURRENT for a total term of .

( ) The sentence/s herein shall run CONCURRENTLY / CONSECUTIVELY with the sentence/s imposed in Cause No. .

(XX) CUSTODIAL RECOMMENDATION FOR COMMUNITY PLACEMENT FOR TWENTY-FOUR (24) MONTHS OR UP TO THE PERIOD OF EARNED EARLY RELEASE AWARDED, WHICHEVER IS LONGER conditioned upon full compliance with the following terms, all of which are imposed pursuant to RCW 9.94A.120(8)(b):

(XX) Defendant shall not sell, use or under any circumstances have in her possession any illicit drug; that is, any drug such as marijuana, cocaine, LSD or any others which are not compounded, manufactured or refined by a licensed commercial pharmaceutical company. That the defendant shall not knowingly be anywhere where illegal or unprescribed drugs are being sold or used. In addition, the defendant shall not sell, use or have in her possession any prescription drugs except those which have been prescribed specifically for her personally by a duly licensed physician and then these prescribed drugs shall be used only in accordance with the instructions of such physician.

(XX) Defendant shall not possess or own weapons of any kind at any time.

( ) Defendant shall submit to random urine analysis as requested by her supervising community corrections officer at the defendant's own expense.

( ) Defendant shall undergo evaluation for poly drug abuse with strict and full compliance with all treatment recommendations.

(XX) Defendant shall not consume alcohol of any kind at any time.

( ) Defendant shall abstain from using alcohol in excess. Due to the fact that the Court does not know whether the defendant has the ability to totally abstain from alcohol at the present time, defendant will be allowed to MODERATELY consume alcohol. However, if there any evidence of criminal activity resulting from alcoholic consumption in regard to driving, disorderly conduct, or any other type of non - socially accepted behavior, such activity will be

considered by the Court to be grounds for further sanctions to be imposed upon the defendant.

( ) Defendant shall undergo counseling as approved by his/her community corrections officer.

(XX) **NO CONTACT PROVISION:** Defendant shall not approach or communicate with, directly or indirectly, or through any third person or by any means, with:

THE GARZA FAMILY

( ) Violation of this **NO CONTACT PROVISION** is a criminal offense under Chapter 10.99 RCW, and will subject the violator to arrest; any assault or reckless endangerment that is a violation of this Order is a felony.

The NO CONTACT ORDER previously entered in this cause number is hereby:

(XX) Extended for the statutory maximum sentence, to wit:

(XX) Permanent: Class A Felony
( ) Ten Years: Class B Felony
( ) Five Years: Class C Felony
( ) One Year: Gross Misdemeanor

( ) Rescinded as of the date affixed to this order.

(XX) That the defendant shall follow all of the rules of his Community Corrections Officer.

(XX) **HIV TESTING:** The Health Department or designee shall test the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing.

(XX) **DNA TESTING:** That the defendant shall submit a blood sample of FIVE (5) m.l. to be acquired under medically safe conditions under the supervision of a Whatcom County Corrections Officer. This sample shall be safely transported to the Washington State Crime Laboratory in Seattle, DNA Section, pursuant to RCW 43.43.754.

Violations of the conditions or requirements of this sentence are punishable by up to SIXTY (60) days of confinement for each violation (RCW 9.94A.200(2).

The following Appendices are attached to this Judgment and Sentence and are incorporated by reference:

( )	Appendix A	Additional Current Offenses
( )	Appendix B	Additional Criminal History
( )	Appendix C	Current Offense(s) Sentencing Information
( )	Appendix D	Findings of Fact and Conclusions of Law for an Exceptional Sentence
( )	Appendix E	Schedule of Restitution
( )	Appendix F	Additional Conditions

SIGNED IN THE PRESENCE OF THE DEFENDANT.

Date: DECEMBER 15, 1998

JUDGE MICHAEL F. MOYNIHAN

TIME OF ENTRY:_____am/pm

Presented by:

DAVID S. McEACHRAN,
Prosecuting Attorney
WSBA #2496

Approved as to form:

JON C. KOMOROWSKI
Attorney for Defendant
WSBA#91001

*** Defendant's Name: SALVADOR HERNANDEZ RIVERA
Date of Birth: 6/30/65; Sex: MALE; Race: HISPANIC

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

THE STATE OF WASHINGTON, Plaintiff, vs. SALVADOR HERNANDEZ RIVERA, Defendant.	)	No. 98-1-00289-4 WARRANT OF COMMITMENT

THE STATE OF WASHINGTON

TO: THE SHERIFF OF WHATCOM COUNTY

The defendant, SALVADOR HERNANDEZ RIVERA, has been convicted in the Superior Court of the State of Washington of the crime or crimes of MURDER IN THE FIRST DEGREE, and the Court has ordered that the defendant be punished by serving the determined sentence of 333+ months on Count No. I.
60 months for deadly weapon = 393 months
Defendant shall receive credit for time served of _____ as of MARCH 21, 1998, and credit for any additional time served beyond that date until defendant is transported to the Department of Corrections.

YOU, THE SHERIFF, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence.

DATED: December 15, 1998

By Direction of the HONORABLE

JUDGE MICHAEL F. MOYNIHAN

N.F. JACKSON, JR., Clerk

By: _____
Deputy Clerk

CAUSE NUMBER: 98-1-00289-4

Thumb prints of: Salvador Hernandez Rivera

(Defendant's Signature)

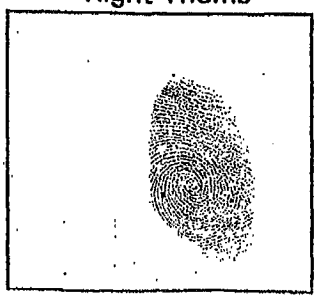
Attested by: (Seal)

(Deputy County Clerk)

WA0370000 12-15-98 (date)

Left Thumb

Right Thumb



APPENDIX B

INSTRUCTION NO. 37

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime.

A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

If one participant to a crime is armed with a deadly weapon, all accomplices to that participant are deemed to be so armed, even if only one deadly weapon is involved.

WHATCOM COUNTY PROSECUTING ATTORNEY
DAVID S. McEACHRAN

CHIEF CRIMINAL DEPUTY
Mac D. Setter

ASST. CHIEF CRIMINAL DEPUTY
Warren J. Page

CRIMINAL DEPUTIES
Craig D. Chambers
Elizabeth L. Gallery
David A. Graham
Eric J. Richey
James T. Hulbert
Ann L. Stodola
Jeffrey D. Sawyer
Anna Gigliotti
Shannon Connor
David E. Freeman
Dona Bracke
Nathan Deen
Evan Jones
Adam Malcolm

Whatcom County Courthouse
311 Grand Avenue, Second Floor
Bellingham, Washington 98225-4079
(360) 676-6784 / APPELLATE FAX (360) 738-2517
COUNTY (360) 398-1310

CHIEF CIVIL DEPUTY
Randall J. Watts

ASST CHIEF CIVIL DEPUTY
Daniel L. Gibson

CIVIL DEPUTIES
Karen L. Frakes
Royce Buckingham

CIVIL SUPPORT ENFORCEMENT DEPUTIES
Angela A. Cuevas
Dionne M. Clasen

APPELLATE DEPUTIES
Kimberly Thulin
Hilary A. Thomas

ADMINISTRATOR
Kathy Walker

April 9, 2010

Susan L. Carlson
Supreme Court Deputy Clerk
The Supreme Court, State of Washington
P.O. Box 40929
Olympia, WA 98504-0929

Re: Personal Restraint Petition of Salvadore Rivera
(Supr. Ct. No. 83923-9)

Dear Ms. Carlson:

I apologize to the Court for the State's late response. The Court's letter and Commissioner's ruling inadvertently got attached to another document and our office was not aware of the deadline until we received the Court's letter dated April 2nd.

Sincerely,

HILARY A. THOMAS
Appellate Deputy Prosecutor

HAT/sk
cc: Nancy Collins, Washington Appellate Project

Supr. Court No. 83923-9

IN THE SUPREME COURT FOR THE
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, vs. SALVATORE RIVERA Petitioner	DECLARATION OF SERVICE

I DECLARE THAT on this date I placed in the U.S. mail with proper postage thereon, a true and correct copy of Respondent, State of Washington's, replacement p. 10 to its response brief in the above-captioned matter, to petitioner's counsel addressed as follows:

NANCY COLLINS
Washington Appellate Project
1511 3rd Avenue, Suite 701
Seattle, WA 98101-3635

DATED this 9th day of April, 2010.

Sydney A. Koss

SYDNEY A. KOSS
Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Sydney Hopkins-Koss
Cc: Hilary Thomas; nancy@washapp.org
Subject: RE: In re PRP of RIvera

Rec. 4-9-10

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Sydney Hopkins-Koss [mailto:SHopkins@co.whatcom.wa.us]
Sent: Friday, April 09, 2010 3:10 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Hilary Thomas; nancy@washapp.org
Subject: In re PRP of RIvera

In re Personal Restraint Petition of Salvador Rivera
Supreme Court No. 83923-9
Attached please find Respondent, State of Washington's, Response to Motion for Discretionary Review, and accompanying letter to the Court, in the above-referenced matter. A copy has been placed in the mail to Petitioner's counsel, and a courtesy copy sent via email due to time constraints.

Hilary A. Thomas
Appellate Deputy Prosecutor
WSBA No. 22007
Whatcom County Prosecutor
(360)676-6784
hthomas@co.whatcom.wa.us

Sydney Ann Koss
Legal Assistant
Appellate Division
Whatcom County Prosecutor's Office
Tel: (360) 676-6784 x50587
Fax: (360) 738-2517

shopkins@co.whatcom.wa.us